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BEFORE THE POLLUTION CONTROL HEARINGS BAORD
STATE OF WASHINGTON

PENBERTHY ELECTROMELT, INTERNATIONAL, INC. Appellant, V. State of Wasington DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 90-136 FINAL REVISED FINDINGS OF FACT, REVISED CONCLUSIONS OF LAW AND ORDER UPON RECONSIDERATION

Procedural Background

On July 23, 1990 Penberthy Electromelt International, Inc. ("PEI") filed an appeal with the Pollution Control Hearings Board contesting the State of Washington Department of Ecology's ("Ecology") issuance of Notice of Penalty No. DE 90-N160 ($46,000), and Order No. DE 90-N154. The DOE Orders alleged violations of Chapt. 173-303 WAC, and by reference 40 Code of Federal Regulations Part 265, in the company's operation of a dangerous[1/] waste treatment storage and disposal facility at 631 South 96th Street, in unincorporated King County just outside the City of Seattle.

At appellant PEI's request and without opposition, the Board held a partial summary judgment hearing on September 11, 1990, with sworn testimony. At appellant's request and with opposition, the hearing was informal. On December 27, 1990, the Board issued an Order

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1/ : Note: In this opinion, the terms "dangerous waste" and "hazardous waste" may be used interchangeably.

granting Ecology's Motion for Partial Summary Judgement, holding that Chapts. 70.105 RCW and 173-303 WAC applied to the glass produced at the facility.

The remainder of the informal hearing was held on August 1 and 27, 1991. Board Members present were: Judith A. Bendor, Presiding, Harold S. Zimmerman, Chairman, and Annette McGee. Appellant PEI was represented by Larry Penberthy, President and owner. At times during the hearing, Mr. Penberthy was assisted, but not represented, by Jeanette Burrage, an attorney and member of the Washington State Bar.

Opening Statements were made. Witnesses were sworn and testified. Exhibits were admitted and examined. Court reporters with Gene S. Barker and Associates (Olympia) took the proceedings, including reporter Bibiana Carter on August 27, 1991.

On September 30, 1991 appellant filed written closing argument with newspaper attachments, and respondent Ecology filed Proposed Final Findings of Fact, Conclusions of Law and Order with portions of the U.S. Code of Federal Regulations.

On December 20, 1991, appellant filed and served information which alerted the Board to a United States D.C. Circuit Court of Appeals decision on the U.S. Environmmental Protection Agency ("EPA") regulations on hazardous waste. The Board directed the parties to file by January 3, 1992, supplemental briefs on the legal effect, if any, of the Circuit Court decision. Appellant filed its written argument on December 12, 1991, and the Department of Ecology filed its

brief with a copy of the decision and regulations on January 3, 1992.

The Board considered:

Order Granting Partial Summmary Judgment, December 27, 1990;
the August 1991 hearing witnesses, exhibits, and opening statements;
the written filings of September 30, 1991 (devoid of newspaper attachments);
and where relevant to the Court of Appeals decision, the arguments contained in the filings of December 12, 1992 and January 3, 1992.

On February 12, 1992, the Pollution Control Hearings Board (PCHB) issued Final Findings of Fact, Conclusions of Law and Order. The Board filed a corrected page 3 on February 26, 1992, which was entered *nunc pro tunc*.

On February 18, 1992 PEI filed a letter, which upon request the Board ordered be considered a Motion for Reconsideration. The Order also provided for filing argument in support of Reconsideration by March 2, 1992, any memorandum in opposition ten days later, and the matter would thereafter be decided on the written record.

On March 2, 1992 appellant filed two letters and attachments in support of reconsideration. On March 9, 1992 Ecology filed its response.

Having considered the above argument, and having deliberated, the Board now makes these:

REVISED FINDINGS OF FACT

I

The Board adopts by reference the Findings of Fact in the December 27, 1990 Order Granting Partial Summary Judgment.

The PEI facility at 631 South 96th Street is in unincorporated King County. At all times relevant to this case, the facility had Interim Status to operate as a Treatment, Storage and Disposal ("TSD") facility under the State of Washington dangerous waste laws. At this facility there is a thermal waste treatment unit, which PEI has been intermittently operating since 1987. At the time of the August 27, 1991 hearing, the furnace was not in operation.

II

On August 8, 1989, Ecology dangerous waste inspectors Laurence Ashley and Barbara Smith inspected the PEI facility. The inspectors did not see any glass residue stored at the site.

On November 16, 1989, Ms. Smith, and Al Odmark with the EPA, inspected the site. During this inspection, Ms. Smith saw about sixty (60) drums of glass residue stored in the front parking lot. The drums were not labeled to show that they contained dangerous waste, nor were they labeled to show accumulation dates or potential hazards of their contents. There was no barrier to protect the drums from the traffic in the parking lot, nor were there any berms or other method of containment. There were no signs to show that the drums contained dangerous waste. The front parking lot was not a permitted area for storage of dangerous waste.

We note that there has been no convincing evidence presented in these hearings that the glass, when it was in the parking lot, presented an actual danger to the public.

III

Mr. Penberthy met with the inspectors that day, and provided a document entitled "Cost Estimate for Closure" dated October 11, 1989. The document had a closure cost estimate of $300. The document stated:

> *No special cleanup will be needed in the event of closure.* Exh. R-7.

The estimate stated that written reports would be at no cost. "*Time will be donated by Larry Penberthy.*" The document further stated: "*The officers of PEI by executive action have opened savings accounts ... at Olympic Savings Bank*" to cover the estimated closure cost. Exh. R-9.

IV

Ecology sent a letter to PEI (December 28, 1989; Exh. R-4a), enumerating an array of compliance issues. The letter stated:

> *After reviewing the closure plan for your facility, it is clear that the plan does not meet the requirements of WAC 173-303-400, and by reference 40 CFR Part 265 Subpart G-Closure and Post-closure.*

The letter then detailed the deficiences, including the need to address: the closing of each dangerous waste unit, the maximum extent of operation during the facility's active life, the maximum inventory of dangerous waste on site and a description of the removal methods, and the decontamination of equipment and the facility.

Regarding the closure cost estimate, the letter listed closure cost estimates previously submitted to Ecology, which ranged from

$3,000,000 in 1988 (Form 5), to $300 in October 1989, and stated:

> *the closure cost estimate must be revised to correspond with the revised closure plan to be submitted to this office by February 16, 1990.* Exh. R-4a

On the issue of glass produced from the thermal treatment of listed dangerous waste, Ecology quoted WAC 173-303-082(1) and concluded that the glass "*must be labeled and stored as listed dangerous waste.*" Exh. R-4a.

The letter listed other compliance issues, including the need to submit a Waste Analysis Plan, and requested its submittal by February 16, 1990.

V

In January 1990, the EPA responded to several letters Mr. Penberthy had written for PEI, stating in part:

> *Hazardous waste must be either disposed at an approved hazardous waste disposal facility or legitimately recyled. "Legitimate recycling" is the use or reuse of the waste, such as an effective substitute for a commercial product. The facility must be able to substantially demonstrate that there is a known market or disposition for the material as a necessary component, and that they meet the terms of the exemption or exclusion. Please contact the Washington Department of Ecology if you have specific questions regarding the recycling exemption.* Exh. R-5.

VI

On February 15, 1990 Ecology sent a letter to PEI responding to the company's questions about glass generated from the thermal

treatment process. The letter stated the glass had to be labeled, dated and stored as a dangerous waste and requested a certified statement that this requirement had been met. Exh. R-24. The letter commented that PEI's proposal to delist the glass was a good way to determine its end use, but was time consuming. The letter then explained the conditions under which the glass could be used as a replacment for gravel in asphalt while the delisting process was ongoing.

VII

The two Ecology inspectors returned to the site on February 28, 1990, to determine if PEI had followed Ecology instructions. The 60 drums of glass were still in the parking lot with the word "Glass" stenciled on them.

During the inspection PEI provided a copy of a Waste Analysis Plan (dated December 13, 1989). The document described general tests to determine the combustion characteristics of the wastes received for thermal treatment. The Plan did not describe how the facility would obtain a physical and chemical analysis of the wastes received. The Plan also did not provide a means for identifying which shipment led to the wastes tested, or for determining the lead and mercury content of the wastes.

VIII

On March 16, 1990, Ecology sent PEI a letter (Exh. R-9) entitled:

Warning Letter Response to your letters dated February 14, 16, 19, 21, and 26, 1990.

The letter informed PEI that within 10 days of receiving the letter, the following must be completed: a revised closure plan and closure cost estimate submitted; the drums with glass had to be placed in a permitted storage area, labeled, and dated as required by WAC 173-303-200(1)(c) and (d); and a certification of compliance submitted. The letter warned that failure to comply:

> *...will warrant administrative enforcement action by Ecology ... administrative order and penalty against Penberthy Electromelt. This letter does not rule out any other actions by Ecology or EPA pertaining to this matter.* Exh. R-9.

IX

The Ecology inspectors visited the site again on March 29, 1990. The glass was still in the parking lot. Inspector Smith and Mr. Penberthy discussed the possible marketing of the glass to a concrete products manufacturer for use as aggregate. Smith said Ecology could not approve such a plan unless it was submitted in writing for review. She said that until Ecology sent out a written approval, PEI had to manage the glass as dangerous waste. She explained the glass could only be delivered to a permitted TSD facility.

That day Ecology received from PEI a revised closure plan, financial assurance, and closure cost estimate.

X

The next day, March 30, 1990, Ecology inspector Ashley returned to the site and saw workers attaching dangerous waste labels to the drums in the parking lot. The labels showed an accumulation date of

the previous day, March 29, 1990. The labels described the contents as "glass". The workers were also attaching a disclaimer label that stated the dangerous waste label was only being attached at Ecology's requirement, and not because the contents were dangerous.

XI

PEI sent a cost estimate to Ecology, which was received on March 29, 1990, with an estimated closing cost of $1,440. The cost estimate was based on PEI employees doing the closing. The glass would be disposed at the "concrete works", and the empty drums sent to a cooperage. No costs were allocated for disposing of any other dangerous wastes that might have remained on site or for equipment used to process dangerous waste.

In the revised Closure Plan there was no identification of the storage areas, nor any description of cleaning the dangerous waste drums prior to shipping them to the cooperage. There was no description of any testing or monitoring of dangerous waste storage areas. Consequently, no costs were identified for such activities.

PEI's Financial Assurance had a closure trust fund with a major bank "being chosen" and details to be provided. In April 1990, however, PEI sent a letter to Ecology stating U.S. Bank charged a minimum of $500 for a trust account fees:

> *This makes their services unsuitable for our use in this case.* Exh. R-13.

XII

On April 24, 1990, PEI sent the glass to Fog-Tite Meter Seal for use as aggregate in concrete products. The glass was shipped under hazardous waste manifest. The manifest did not show the dangerous waste code or the transporter's telephone number. The manifest listed the quantity as 12,000 pounds. Fog-Tite Meter Seal was not a permitted TSD facility for dangerous waste.

PEI had listed the off-site shipment of the glass in its proposed Closure Plan, submitted March 28, 1990 to Ecology. There is no indication Ecology had approved the Plan by April 24, 1990, or at any time.

On May 1, 1990 Ecology learned from the EPA that the glass was no longer on-site. Ecology called PEI, and Mr. Penberthy informed them about the disposal. By certified mail, dated May 4, 1991, Ecology stated to PEI:

> *You must immediately stop further recycling until detailed proposals have been submitted and reviewed and a determination made by Ecology.*
>
> *Recent discussions with our headquarters office have clarified the recycling issue. Listing takes precedence over designation as a solid waste. Therefore, listed glass cannot be recycled as an aggregate in concrete.* Exh. R-18.

After May 4, 1990, PEI did not make subsequent off-site shipments of the glass.

XIII

On June 19, 1990 Ecology issued to PEI Notice of Penalty No. DE 90-N160 ($46,000), and Order No. DE 90-N154 ("Enforcement Order"). See Conclusion of Law III below, for a recitation of the alleged violations.

XIV

On July 23, 1990 PEI filed an appeal with the Pollution Control Hearings Board, contesting these Orders. The appeal became PCHB No. 90-136.

Also on July 23, 1990 Ecology received from PEI a revised Waste Analysis Plan and Closure Plan. The Waste Analysis Plan included information about documentation of mercury and lead content of dangerous waste received, and information required of generators. The tests described in the Plan would provide general information about combustion. The tests still would not provide sufficient information to identify the dangerous wastes received. The revised Closure Plan, again showed a closure cost of $1,440.

XV

Any Revised Conclusion of Law deemed to be a Revised Finding of Fact is hereby adopted as such.

From the Revised Findings of Fact, the Board makes these:

REVISED CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and over this

subject matter. Chapts. 70.105 and 43.21B RCW.

II

We had previously concluded the glass produced at the PEI thermal treatment unit during the process of treating dangerous wastes, is a "residue" under WAC 173-303-082(1) and had to be treated as a dangerous waste. Order Granting Partial Summary Judgment at Conclusion of Law V. At the time of the August 1991 hearing, PEI had not sought an exemption from regulation, under WAC 173-303-910, for the glass.

We review that Order Granting Partial Summary Judgment in light of Shell Oil Company v. Environmental Protection Agency, (D.C. Cir., 1991).

Appellant contended the Shell Oil decision meant the State of Washington Department of Ecology can no longer apply the state regulations, because they are derived from federal hazardous waste rules which have been vacated. Ecology opposed this contention.

In Shell Oil, supra, the United States Court of Appeals vacated two federal rules which define hazardous waste, the "mixture rule", 40 C.F.R. 261.3(a)(2) and the "derived from rule", 40 C.F.R. 261.3(c)(2). On strictly procedural grounds, the Court vacated the rules because the EPA had adopted the rules without proper notice and comment, in violation of the federal Administrative Procedures Act. The Court did not consider the substantive validity of the rules. The

Court nonetheless stated, at pp. 20-21, that EPA may wish to consider re-enacting the regulations on an interim basis under the "good cause" exemption of 5 U.S.C. 553(b)(3)(B) pending full notice and comment, "[i]*n light of the dangers that may be posed by a discontinuity in the regulation of hazardous wastes*[...]." The Court did not consider the validity of the State of Washington program or regulations.

The State of Washington regulations, WAC 173-303-082(1) and -082(3), are a part of the state hazardous waste program that applies instead of the federal program. 42 U.S.C. 6926(b). As a result, the State of Washington has adopted its own program of hazardous waste management, RCW 70.105.130, and its own hazardous waste management regulations. See RCW 70.105.130(2)(e). The state program can be more stringent than the federal program. 40 C.F.R. 271.1. As a result, despite the vacating of some federal regulations, in Shell Oil, supra, the state regulations continue to remain in effect. This result does not change even if EPA has since issued interim final rules.

Therefore, we re-affirm our Order Granting Partial Summary Judgment, and hereby encorporate its Conclusions of Law by reference.

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III

Ecology's Penalty Order No. DE 90-N160 alleged the following violations:

Chapt. 173-303-	Conduct
200(1)(c) and (d)	Failure to label dangerous waste containers and label with the accumulation date.
400 and by reference 40 CFR Part 265.110 through .116, .142. and .143	Operating without approved Closure Plan, Cost Estimate and Financial Assurance.
400 and by ref. 40 CFR Part 265.375	Operating without adequate Waste Analysis Plan

Chapt. 173-303-	Conduct
505(2) and 950(2)	The use of hazardous waste glass as aggregate in concrete without complying with requirements for recyclable materials used in a manner constituting disposal.
180	Transporting hazardous waste glass off-site using an incomplete manifest.

Order No. DE 90-N154 alleged the above violations, and the following additional ones:

Chapt. 173-303-	Conduct
200(1)(b), and by reference 630(5)(b) and 805(6)	Failure to provide adequate storage area for hazardous waste glass.
400(3)(a)(i), and by reference 300(5) and 40 CFR Part 265.13	Failure to develop and follow adequate Waste Analysis Plan

We now determine what violations, if any, had occurred prior to June 19, 1990.

Closure Plan, Cost Estimate, and Financial Assurance:

IV

WAC 173-303-400 requires non-exempt interim status facilities to comply with 40 CFR Parts 265.110 through .116, .142 and .143.

The purpose of these requirements is to protect public welfare and health in case the plant is no longer operating and needs to be closed.

In the event the operator/owner is not closing the facility, the Closure Plan has to be in sufficient detail so a third party, such as the government, can safely and adequately close the facility. The cost estimate and financial assurance are also key elements to holding the owner or operator financially responsibility, in advance, for such closure, even if a third party ultimately does the closing.

Absent an adequate Closure Plan, third parties trying to close a dangerous waste facility could be faced with unknown chemicals, and possibly contaminated equipment. Closure under such circumstances could be more costly. Absent an adequate owner or operator closure cost estimate and financial assurance, the public could possibly be burdened with the cost of an expeditious closing.

The law was designed to prevent this from happening.

V

Closure Plan:

The PEI Closure Plans were deficient, violating WAC 173-303-400 in several ways, by failing:

> To identify or address closure of all permitted dangerous waste storage areas. Reference 40 CFR Part 265.112(b)(1);
>
> To describe how final closure will be conducted in compliance with 40 CFR Sec. 265.111, as required by 40 CFR Part 265.112(b)(2);
>
> To provide an estimate of the maximum inventory possible at the site. 40 CFR Part 265.112(b)(3).
>
> To describe the steps need to remove or decontaminate all hazardous waste residues, contaminated equipment, structures and soils. 40 CFR Part 265.112(b)(4).
>
> To describe other activities necessary during the closure to ensure compliance with performance standards, including ground-water monitoring, leachate collection, etc. 40 CFR Part 265.112(b)(5).
>
> To describe a schedule for the closure of each hazardous waste management unit. 40 CFR Part 265.112(b)(6).

PEI was alerted to deficiences as early as December 1989. The company did little to correct them prior to the issuance of the penalties.

PEI had been operating since 1987 as a dangerous waste interim facility. It failed its mandatory responsibilities under WAC 173-303-400, and by reference 40 CFR Secs. 265.111 and .112. Each day the facility operated out of compliance can constitute a separate violation.

VI

Closure Cost Estimate:

The Closure Cost Estimate is a critical component to ensure that if the facility closes, the public will not bear the costs. The plan and estimate are the bases for determing the funds the owner/operator has to assure.

The cost estimate requirements are found at WAC 173-303-400 referencing 40 CFR Sec. 265.142, based on properly closing the facility in accordance with 40 CFR Part 265.11 through .15.

The regulations state:

> (2) The closure cost estimate must be based on the costs to the owner or operator of hiring a third party to close the facility. [...] 40 CFR Part 265.142(a)(2); emphasis added.

Closure by using third parties is likely more expensive than using ones' own employees.

PEI Cost Estimates, filed with Ecology on November 16, 1989 and March 28, 1990, assumed PEI employees would close the facility. Such assumption clearly conflicts with the regulations.

In addition, the Estimates assumed the thermal treatment unit would be able to process any dangerous waste remaining in storage at the time. The regulations allow for this, provided:

> ... he [sic] can demonstrate that on-site disposal capacity will exist at all times over the life of the facility. 40 CFR Sec. 265.142(a)(2).

PEI had not demonstrated this. On this basis, too, the costs were not properly calculated.

PEI's Closure Cost Estimates also did not assume the facility was storing a full capacity of dangerous waste and the wastes were disposed by a third party off-site.

PEI violated WAC 173-303-400 and by reference 40 CFR Sec. 265.142 by not complying with mandatory closure cost estimate requirements. Each day the facility operated out of compliance constituted a separate violation.

VII

Closure Financial Assurance:

WAC 173-0303-400 references 40 CFR Sec. 265.143. This requires each owner or operator to establish financial assurance for closure of the facility. There are a variety of means to do this, at the owner/operator's option. 40 CFR Sec. 265.143 lists the acceptable methods of providing such assurance: closure trust fund, surety bond, closure letter of credit, closure insurance, and financial test and corporate guarantee for closure. PEI did not comply with these requirements. It therefore violated WAC 173-303-400 and by reference 40 CFR Sec. 265.143. Each day the facility operated out of compliance constituted a separate violation.

VIII

Waste Analysis Plan:

Ecology Order No. 90-N154 (but not Penalty Order DE 90-N160), recited a violation of WAC 173-303-400, referencing 40 CFR Part 265.13.

The PEI Waste Analysis Plan dated December 13, 1990 was geared to determining the wastes' combustion characteristics. While this combustion information may have been important to the owner/operator, the information was not sufficient to comply with the regulatory requirements of 40 CFR Part 265.13(a) and (b)(1)-(5). Ecology Order No. DE 90-N154 was correct in citing a violation.

IX

Lead and Mercury:

Because the dangerous waste was being treated by thermal process, the Waste Analysis Plan also had to provide for determining the concentrations of lead and mercury, unless the owner or operator provided documentation that lead and mercury are not present. WAC 173-303-400 and by reference 40 CFR Part 265.375. Prior to both Orders' issuance in June 1990, PEI failed to comply with this requirement, violating the regulation.

Residue Glass

X

The remaining alleged violations relate to the handling of the

"residue" glass, which by operation of law is a dangerous waste unless exempted. Order Granting Partial Summary Judgment.

The Ecology Orders recited violation of WAC 173-303-505(2) and -950(2) when PEI sent the material off-site to be used as aggregate in concrete. The glass was a recyclable material. WAC 173-303-040(74). When PEI had it transported to a company for use in another product, the glass was being used in a manner that constituted disposal. WAC 173-303-505(2). Since PEI generated this glass, it had to comply with the disposal requirements of WAC 173-303-170 through -230, as referenced by WAC 173-303-505(2)(a).

Ecology contended that PEI did not comply with many of these provisions, and suggests, in particular, WAC 173-303-170(5) and by reference -140(4)(c). WAC 173-303-140(4)(c) requires that land disposal of such waste shall only be in accord with subsections (5), (6), or (7). However the definition of "land disposal" at WAC 173-303-140(3)(c) does not appear to cover the use of the glass in other products. Ecology's reference to violation of -140(4)(c) did not provide clear guidance to the Board. Clear, cogent legal reasoning has to be provided by the party advocating the sustaining of the enforcement of such hazardous waste violations. We are therefore unable to conclude that appellant PEI violated WAC 173-303-505(2) by reference to WAC 173-303-170(5) and by reference to WAC 173-303-140(4)(c).

XI

PEI violated WAC 173-303-180(1)(a) and (d) when it shipped the glass under dangerous waste manifest without providing the transporter's telephone number or the waste identification code. The manifest contained the word "glass", but did not otherwise identify the substances from which the glass was a residue.

XII

The drums in the parking lot also lacked proper labels with accurate accumulation dates, in violation of WAC 173-200(1)(c). The drums had not been properly labeled with "dangerous waste" written on them, in violation of WAC 173-303-200(1)(d).

XIII

Order No. DE 90-N154 (but not Penalty Order No. DE-N154), recited violation of WAC 173-303-200(1)(b), and by reference, WAC 173-303-630(5)(b) and -805(b). These sections establish minimum requirements for a generator's storage of dangerous waste when they do not have a permit for storage. PEI has interim status with allowed storage areas. PEI stored the residue glass in an unidentified storage area. The requirements of WAC 173-303-200(1)(b), therefore, apply. This provision requires compliance with WAC 173-303-630(5)(b) which mandates storage in a manner that will not cause rupture of the containers. PEI violated this provision by storing the glass in its parking lot with no barriers to protect the drums from traffic.

XIV

Penalty Amount:

RCW 70.105.080 authorizes penalties of up to $10,000 per day for each violation. Each day constitutes a separate violation. Coastal Tank Cleaning v. DOE, PCHB No. 90-61. Ecology had the authority to assess a penalty in excess of $46,000.

The Board decides *de novo*, the appropriateness of a penalty. Northwest Processing, Inc. v. DOE, PCHB Nos. 89-141 and -142 (Findings of Fact, Conclusions of Law and Order after Reconsideration; July 18, 1991). Ecology did not apportion the penalty. We review the appropriateness of the penalty in its entirety. See Northwest Processing, supra.

The purpose of civil penalties is to promote compliance by the company and the public. Northwest Processing, supra; Coastal Tank, supra. In determining the penalty's appropriateness, we look at several factors, including the nature, extent, and duration of the violations, and appellant's efforts to comply prior to the issuance of any penalty order. Id.

The violations for failing to provide adequate Closing Plan, Closing Cost Estimate, and Financial Assurance are significant. PEI was provided guidance on compliance, ample time to comply, and failed to do so.

At the time the Orders issued, PEI's Waste Analysis Plan did not comply with the requirement for determining the origin of the wastes, the concentrations of lead and mercury or having documentation that the wastes did not contain these elements. Ecology's warning letter of March 16, 1989 did not raise the Waste Analysis Plan lead and mercury issue. So that violation may well have been by oversight and under the circumstances do not appear to be significant. After the Orders issued, the July 23, 1990 submittal to Ecology contained this sentence:

> *Information on lead, mercury and sulfur content are provided by the certified profile sheet.*

We are unable to conclude, from the argument presented to date, that appellant PEI violated WAC 173-303-505 by reference to WAC 173-303-170(5) and by reference WAC 173-303-140(4)(c), in the shipping of the glass off-site to be used in products.

PEI violated WAC 173-303-180 by using an incomplete manifest when it sent the glass off-site. The deficiency appears, under these particular facts, to be minor.

PEI violated WAC 173-303-200(1)(b) in the storage of the dangerous waste glass residue. This violation appears to be minor. PEI violated WAC 173-303-200(1)(c) regarding labeling the glass.

Given all the factors above, we conclude some mitigation is appropriate. The penalty will be reduced by $7,500, and an additional $7,500 should be suspended provided PEI does not violate Washington

environmental laws for three years from the date of this decision.

XV

Any Revised Finding of Fact deemed to be a Revised Conclusion of Law is hereby adopted as such.

From these Revised Conclusions of Law, the Board issues this:

ORDER

Upon reconsideration, Ecology Enforcement Order No. DE N154 and Penalty Order No. DE N160 are AFFIRMED except as specified at Revised Conclusion of Law X, above.

The $46,000 penalty is REDUCED to $38,500, and $7,500 of that remaining amount is SUSPENDED provided Penberthy Electromelt International, Inc. does not violate State of Washington environmental laws for 3 years from the date of this Order.

DONE this 26th day of March, 1992.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding Member

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. McGEE, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PENBERTHY ELECTROMELT INTERNATIONAL, INC., Appellant, v. State of Washington DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 90-136 ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

A partial summary judgment informal hearing was held on September 11, 1990, in the Board's office in Lacey. Board Members present were: Judith A. Bendor, chair and presiding, Harold S. Zimmerman and Annette McGee. Appellant Penberthy Electromelt International, Inc., was represented by Larry Penberthy, President. The Department of Ecology was represented by Assistant Attorney General Lucy E. Phillips. Court Reporter Bibi Carter with Gene Barker & Associates took the proceedings.

At the hearing sworn testimony was heard, exhibits were introduced and reviewed, and oral argument was made. Written argument had been filed and was reviewed.

From the foregoing, the Board makes these:

FINDINGS OF FACT

I

Larry Penberthy is the President of Penberthy Electromelt International, Inc. The company is family-owned. It is located at

631 So. 96th Street, in unincorporated King County, just outside Seattle.

II

The company has been handling hazardous waste at this facility, including waste containing dioxin, since at least 1985. The company obtained interim status after filing a Part A permit application with the U.S. Environmental Protection Agency (EPA) and the Department of Ecology (DOE) as an thermal treatment facility in October 31, 1985.

III

The company operates a thermal redox reactor furnace (Penberthy Pyro-Converter) and incinerates dangerous waste. In April 1989 the company was incinerating dangerous wastes at a volume of 15 drums per day. In November 1989 the company began 7 days per week, 24 hour operation. The company's primary objective with incineration was to demonstrate its furnace for sale to others.

IV

Brokers deliver the wastes to the company in drums. The wastes incinerated include kerosene, paint derived liquids, toluene, xylene, asphalt paving, dry cleaning solvents (chlorinated), wood preserving wastes, plating wastes, plastics, and so forth. Several of these wastes contain substances which are listed dangerous wastes.

The waste is introduced into the furnace either through a pipe or from a hopper via an auger or ram. Inside the furnace there is molten

glass. The dangerous waste is generally less heavy than the molten glass and floats, except for metals. The gases which result are sent to a scrubber for handling. These emissions are not the subject of this appeal.

The furnace is designed to operate at a temperature of greater than 1400 degrees fahrenheit. At such temperature carbonaceous materials that float burn. The metals in the waste sink to the bottom of the furnace and are removed periodically.

Every week or two the molten glass is drained out and cooled to make fine glass particles. The glass is currently being stored on-site.

V

The company has not been designating the resulting glass material as a dangerous waste. It is the company's position that the waste is no longer toxic, hazardous or dangerous and thus the Department has no authority to regulate it under the dangerous waste laws.

The company has not applied for an exemption under WAC 173-303-910. After application, it may take two to four years to receive an exemption. Appellant is unwilling to wait that long, storing the glass in the interim.

VI

On June 19, 1990 the Department issued two orders which are the subject of this appeal. Order No. DE 90-N154 alleges violations of

the dangerous waste regulations, Chapt. 173-303 WAC. Order DE 90-N160 assessed a penalty of $46,000 for the violations.

VII

Any Conclusion of Law deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these Conclusions of Law:

CONCLUSIONS OF LAW

I

The Pollution Control Hearings Board has jurisdiction over these parties and this issue. Chapts. 70-105 and 43.21B RCW.

II

The sole legal issue before the Board at this time is:

> *Does Chapt. 70.105 RCW and Chapt. 173-303 WAC apply to the glass material Penberthy Electromelt International, Inc. produces by the pyro-converter?*

Appellant's statement of the legal issue is:

> *Does DOE lose authority over solid wastes which are dangerous or extremely hazardous as soon as the wastes are detoxified?*

For purposes of this motions practice, we are assuming that the glass is not dangerous or hazardous to the public physically. The above legal issues are essentially the same.

III

Chapt. 70.105 RCW is the state law governing hazardous waste

management. The statute implements the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Sec. 6901, et seq. RCW 70.105.130. Like RCRA, Chapt. 70.105 RCW is a comprehensive "cradle to grave" approach to managing the wastes. The statute provides the Department with broad powers to regulate hazardous wastes. RCW 70.105.007(1). The Department has the authority to adopt the rules necessary to implement the statute, including implementing RCRA. RCW 70.105.130(2)(e).

IV

We take judicial notice of Chapt. 173-303 WAC as amended October 1989.

The Department has adopted Chapt. 173-303 WAC pursuant to statutory authority. Appellant does not contest that Chapt. 173-303 WAC applies overall to his facility. He has applied for and obtained interim status as a treatment, storage, disposal facility under the hazardous waste statute.

V

WAC 173-303-082(1) provides:

> *Any waste which is listed or which is a residue from the management of waste listed on the dangerous waste sources list shall be designated a dangerous waste and shall be identified as DW [...].* [Emphasis Added].

WAC 173-303-082(3) specifically provides:

> *If a person mixes solid waste with a waste that would be designated as a dangerous waste sources under this section, then the entire mixture shall be designated as a dangerous waste sources [...].*

Appellant is operating a dangerous waste treatment facility. The facility treats designated dangerous waste and a mixture of solid waste and dangerous waste. The glass that results from the treatment is a "residue" under WAC 173-303-082(1).

VI

The statutory scheme does provide a way for appellant to no longer designate or otherwise handle the glass as a dangerous waste. The company can apply for and receive an exemption under WAC 173-303-910. This regulatory exemption scheme provides the framework for ensuring that residues of wastes are in fact no longer dangerous.

The regulations do not allow a treatment facility which produces a residue to skip the regulatory exemption application process altogether. In essence, that is what appellant is requesting permission to do.

The exemption approach is part of the overall regulatory scheme and is consistant with Chapt. 70-105 RCW. We conclude the Department still has authority to regulate as dangerous waste the glass produced at the Penberthy facility.

However, we view with dismay the two years or more that it takes to obtain an exemption. Such delay might not encourage the development of a vigorous industry to handle dangerous waste.

VII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters the following:

ORDER

The Department of Ecology's motion for partial summary judgment is GRANTED.

DONE this 27th day of December, 1990.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Chair

Harold S. Zimmerman by JAB

HAROLD S. ZIMMERMAN, Member

Annette S. McGee

ANNETTE S. McGEE, Member